

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

July 22, 2011

Bobby G. Foreman
SBI # 0026
Sussex Community Correctional Center
23207 Dupont Boulevard
Georgetown, DE 19947

RE: *State of Delaware v. Bobby G. Foreman*
Cr.A. No. S10-01-0737 - Def. ID No. 0911006204
Motion for Postconviction Relief
Letter Opinion

Date Submitted: May 13, 2011

Dear Mr. Foreman:

This is my decision on your Motion for Postconviction Relief. You were charged by indictment with Carrying on an Occupation Without a License, Home Improvement Fraud of a Senior, and Theft by False Pretenses over \$1,500. The charges arose out of an incident where you contracted to put a roof on a home and accepted the homeowner's money but did not do any work. You pled guilty to Carrying on an Occupation Without a License on October 20, 2010. In exchange for your plea, the State agreed to enter a *nolle prosequi* on all of the remaining charges in the indictment, as well as the fraud charges you had pending in the Court of Common Pleas. The agreed-upon recommendation, which was based upon you paying \$500 in restitution at sentencing, was as follows: two years at Supervision Level V, suspended for one year at Supervision Level I Restitution Only, you would have no contact with the victims, pay restitution at a rate of \$300 to \$500 per month, and not be employed in the home construction or repair business in a fiduciary capacity. At your sentencing hearing on October 25, 2010, you did not have the \$500 in required restitution per your plea agreement. I then sentenced you to two years at Supervision Level V, suspended for one year at Supervision Level IV Work Release, followed by one year at Supervision Level III probation. I gave the State 60 days to calculate restitution, ordered

you not to have any contact with any of the victims, and not to be self-employed in the construction business.

The State was represented by Deputy Attorney General Lisa Whitelock, Esquire. You were represented by William F. Richardson, Esquire, and Dean C. Johnson, Esquire. Both Richardson and Whitelock have submitted affidavits in response to your motion. You argue that: (1) the plea agreement was unfulfilled, (2) your attorneys were ineffective, and (3) the plea agreement was invalid. This is your first motion for postconviction relief and it was filed in a timely manner. Therefore, there are no procedural bars to your motion.

DISCUSSION

I. Unfulfilled Plea Agreement

You argue that your plea agreement was not fulfilled because the sentence you received was different from the one you bargained for prior to sentencing. During your plea colloquy, Richardson advised me that you did not understand the plea agreement recommendation as far as whether or not it was binding on me. It was explained to you that the plea agreement recommendation was not binding on me. I advised you that I tend to follow the recommended plea agreement, however, I did reserve the right to not follow it. I stated:

“Just to put your mind at ease I guess as much as I really can, my practice is largely to follow the recommended plea agreement, but I don’t have to. And I certainly do reserve the right not to follow it because that is my right.”¹

The Plea Agreement Form signed by you included a condition that you would appear for your sentencing with \$500 towards the restitution you owed. You did not have the \$500 when you appeared. You broke your agreement with the State when you did not show up with agreed-upon amount to be applied to restitution. By signing the Plea Agreement Form, you asserted your understanding and acceptance to all of the conditions that it entailed. Since you did not uphold your end of the plea agreement, I exercised my

¹ Plea Colloquy Transcript at 5.

discretion and right and sentenced you as I found appropriate. Therefore, your claim of an unfulfilled plea agreement is without merit.

II. Ineffective Assistance of Counsel

You argue that Richardson was ineffective because he intentionally neglected an obligation to appear at your sentencing, and Johnson was ineffective because he (1) was unprepared to represent you at your sentencing, (2) should have requested a postponement of your sentencing but failed to do so, and (3) did not inform you of your right to withdraw your guilty plea. The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief.² In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must show: “(1) counsel’s representation fell below an objective standard of reasonableness; and (2) counsel’s actions were so prejudicial that, but for counsel’s errors, the defendant would not have pled guilty and would have insisted on going to trial.”³ Further, a defendant “must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.”⁴ It is also necessary that the defendant “rebut a ‘strong presumption’ that trial counsel’s representation fell within the ‘wide range of reasonable professional assistance,’ and this Court must eliminate from its consideration the ‘distorting effects of hindsight when viewing that representation.’”⁵ There is no procedural bar to claims of ineffective assistance of counsel.⁶

² *Strickland v. Washington*, 466 U.S. 668 (1984).

³ *State v. Thompson*, 2003 WL 21244679 (Del. Super. April 15, 2003), *citing Strickland*, 466 U.S. 668 (1984).

⁴ *State v. Coleman*, 2003 WL 22092724 (Del. Super. Feb. 19, 2003).

⁵ *Coleman*, 2003 WL 22092724, at *2, *quoting Strickland*, 466 U.S. at 689.

⁶ *Coleman*, 2003 WL 22092724, at *1, *citing State v. Johnson*, 1999 WL 743612, at *2 (Del. Super. Aug. 12, 1999).

A. Failed to Appear at Sentencing

You argue that Richardson was ineffective because he failed to appear at your sentencing. Richardson acknowledges that Johnson appeared at your sentencing on his behalf. Johnson is a very experienced attorney with the Office of the Public Defender. You make no allegations as to how Richardson's presence would have changed anything at your sentencing. This argument is conclusory and without merit.

B. Unprepared for Sentencing

You argue that Johnson looked "so uncomfortable and unprepared" that there was no way he could successfully represent you at your sentencing. It was clear to me from the start of your sentencing that Johnson was prepared. He understood the facts and conditions of your plea agreement, which was demonstrated by his concern about your failure to appear with the proper restitution. He argued for an extension to provide you with more time to come up with the \$500 for restitution per your plea agreement. You make no allegations as to how your sentencing would have been any different if Johnson had been given more time to prepare for your sentencing. The problem was your failure to appear with the \$500, not Johnson's representation of you. This argument is conclusory and without merit.

C. Postponement of Sentencing

You argue that Johnson should have requested a postponement of your sentencing so he could "probe your case." It is unclear what part of your case was left for Johnson to probe. You had already pled guilty five days earlier. You had agreed to a plea agreement with the State that required you to pay \$500 towards your restitution at the time of your sentencing, which you failed to do. You were advised that I was not bound by any plea agreement between you and the State and that I had the right to sentence you according to my discretion. There was nothing else left to probe. This argument is conclusory and without merit.

D. Guilty Plea Withdrawal

You argue that Johnson was ineffective because he failed to inform you of your right to withdrawal your guilty plea. Your own words belie your argument. On the Truth-In-Sentencing Guilty Plea Form you indicated that you were entering your guilty plea knowingly, intelligently, and voluntarily with full knowledge of the rights you were waiving.

The following were your statements during the Plea Colloquy:

The Court: All right. Mr. Foreman, I understand you have decided to plead guilty to the charge of carrying on an occupation without a license. Is that what you have decided to do?

The Defendant: Yes, sir.

The Court: Do you understand the nature of that offense?

The Defendant: Yes, sir.

The Court: Do you understand the maximum period of incarceration that you face?

The Defendant: Yes, sir.

The Court: Do you understand the maximum fine that you face?

The Defendant: Yes, sir.

The Court: Do you understand that you will have to pay restitution as part of your sentence if restitution is, in fact, owed?

The Defendant: I am aware of that, sir.

The Court: You have certain rights; those rights are listed on the Guilty Plea Form which you have already signed. Have you discussed those rights with Mr. Richardson?

The Defendant: Yes, sir.

The Court: Do you understand those rights?

The Defendant: Yes, sir.

The Court: Do you understand that by pleading guilty to this one offense you are waiving all of those rights and there won't be a trial?

The Defendant: Correct, sir.

The Court: Did anybody force you to take this plea?

The Defendant: No.

The Court: Did anybody promise you anything in exchange for it?
The Defendant: No.

The Court: Did you commit the offense you are pleading guilty to?
The Defendant: Yes.

The Court: Are you satisfied with Mr. Richardson's representation of you?
The Defendant: Yeah, he came around. Yeah.

The Court: Are you sure that this is how you wish to resolve the charges against you?
The Defendant: Yes, I do.

The Court: All right. Based on that, I will accept your plea as being made knowingly, intelligently and voluntarily. I will defer sentencing until Monday.⁷

You have presented no evidence that you wished to withdrawal your guilty plea. The only evidence before me is that you were satisfied with your attorney's representation and you knowingly, voluntarily, and intelligently entered your guilty plea. In fact, prior to your sentencing, you and I had a discussion about your current employment, living arrangements, and one of your victims in open court. At no point did you ever state that you wanted to withdrawal your guilty plea. It was only after I sentenced you that you changed your mind. That is hardly a basis for withdrawing a guilty plea. This argument is without merit.

III. Invalid Plea Agreement

You argue that the plea agreement between you and the State is invalid because you did not answer question number 10 on the Truth-In-Sentencing Guilty Plea Form. Question number 10 asks "[h]as anyone promised you what your sentence will be?" It is true that you failed to provide an answer on the Form to question number 10. This was brought to my attention before you pled guilty. In open court and as the record indicates it was explained to you that the plea agreement offer from the State was just a recommendation, not a promise. It was my prerogative to accept the plea agreement

⁷ Plea Colloquy Transcript at 6-9.

negotiated between you and the State or impose my own sentence. After explaining this to you, I asked you during the Plea Colloquy if anyone had promised you anything in return for your plea and you stated “no.” You are bound by your answers in open court.⁸ This argument is without merit.

CONCLUSION

Your Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary
cc: Lisa Whitelock, Esquire
Dean C. Johnson, Esquire
William F. Richardson, Esquire

⁸ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).